IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1601

DONALD GOODMAN, VINCENT N. DEGENNARO, MARY D. DEGENNARO, RIO CORPORATION, a New Jersey Corporation and DONGOOD CONTRACTING CORP., a New Jersey Corporation,

Petitioners,

vs.

LIZZA & SONS, INC., a New York Corporation, A. J. ORLANDO CONTRACTING CO., a New York Corporation and INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Counter-Statement of Facts

The statement of the case in the petition of the petitioners is substantially correct as to the nature of the

proceedings in the New Jersey courts. However, there is a substantial misstatement as to the alleged liability of respondent A. J. Orlando Contracting Co. (hereinafter "Orlando").

The gross misstatement appeared in the second paragraph on page 4 of the printed petition. The misstatement is with respect to the claim of the petitioners in the following statement:

> "Dongood claims that it was not in default under the I.N.A. Bond as to Orlando because Orlando failed to pay Dongood for the extra work and services performed by it knowing that Dongood was dependent upon these funds to be received from Orlando to pay its labor and Material suppliers and that Orlando was responsible for all of the sums of money paid by I.N.A. to material men for which I.N.A. is now suing Dongood."

The erroneous part of the statement is the allegation that "Orlando failed to pay Dongood for the extra work and services . . ." The claim of petitioners on which the proceedings was based is not on alleged nonpayment for claimed extra work and services performed. The claim as appears from the record in the cause is that at the request of petitioners Donald Goodman, Vincent N. DeGennaro, Mary D. DeGennaro, Rio Corporation and Dongood Contracting Corp. (hereinafter "Orlando"), a so-called liquidation agreement was executed where by Orlando agreed that it would process a claim on behalf of Dongood. This claim was to be prosecuted against the State of Connecticut but in the name of Orlando since Orlando was the contractor with the State of Connecticut (Da36a-3-1 to 5). Dongood was the subcontractor who could not so proceed.

This agreement was negotiated out of the Orlando offices through Attorney James F. Kenney (namely Messrs. Clancy, Kenney, Flynn & Ford, Esqs.) with offices at Bridgeport, Connecticut (Da361-3-12 to 19). A copy of the letter from Attorney Kenney dated January 6, 1968 is annexed to the supporting affidavit of Orlando (Da36a-5). Under date of October 30, 1970 Attorney Kenney wrote to Orlando advising that the claim would have to be prosecuted on or before March 29, 1971 (Da361-7); and Orlando sent a copy to Dongood with respect to the necessity for proceeding by the date set. However, Dongood did not proceed as required so that the claim could be processed.

Dongood was then advised by Orlando with respect to its failure to proceed on the prosecution of the claim stating, "If we do not hear from you by February 10, 1971, we will consider the matter closed." (Da361-10).

No response was received then or at any time thereafter from Dongood. The time limitation for prosecuting the claim passed by reason of the failure of Dongood to proceed as requested (Da361-5 through 10).

Since there was a complete lack of response by Dongood it, therefore, had no further rights on the claimed agreement with Orlando for prosecution of the claim.

In any event on July 22, 1972 a settlement was made by these parties, that is the petitioners and Orlando, whereby payment was made by Orlando to Dongood in the sum of $16,349.15. A general release was executed by Dongood in favor of Orlando and others. While the appendix of appellants' brief in the Appellate Division of the Superior Court of New Jersey does not carry this copy, such as annexed to the affidavit of Orlando (Da36a-4-16 to 20). The record will show that it was so annexed;

and a copy of the release appears in the appendix annexed to the answer of Orlando (Da34a-7 to 8).

As to the claim respecting performance of the contract there were no supporting allegations submitted on behalf of Dongood as to any acts in New Jersey with respect to the *performance* of the subcontract. There are general allegations as to telephone conversations; but nothing appears in the record as to when they took place, or whether or not such telephone conversations had any bearing upon the performance of the contract agreement.

It was not disputed that the contract was made in the State of Connecticut and that all acts pertaining to the performance of the contract took place in the State of Connecticut and nowhere else.

Orlando also maintained that to compel it to litigate in the State of New Jersey would violate "traditional notions of fair play and substantial justice". It appears that in order to defend the case in New Jersey, Orlando would require as witnesses officials of the State of Connecticut who would not be subject to appearance at a trial by subpoena.

Reasons Why the Writ Should be Denied

The court should not grant a Writ of Certiorari because the State of New Jersey did not have jurisdiction. The sole arguments presented by the petitioners are as follows:

1. That the petitioners are being sued in the courts of New Jersey and believe that by reason of the claim against them, it is necessary to implead Orlando as a third party defendant because of the burden upon them

in the event of an adverse decision against them by plaintiff, they would then have to resort to instituting action in the Connecticut court to recover for alleged damages sustained in the suit in New Jersey.

2. That even though the contract between the parties (Orlando and Dongood) was executed in Connecticut and performed in its entirety in Connecticut, nevertheless because of telephone talks from Orlando in the State of Connecticut to the offices of the petitioners in New Jersey, that this was sufficient to give the courts of New Jersey jurisdiction. There is no proof submitted in any form as to when the telephone conversations took place or as to what bearing, if any, they had on the performance of the contract. The contract itself was not for monies claimed to be owing for labor and material supplied by petitioners for which it had been paid. Dongood claims that it engaged Orlando to prosecute a claim for it against the State of Connecticut on the Connecticut contract of Orlando. The proofs, which were not denied, showed that petitioners (Dongood) failed to supply the support required for the application. The result was that application for relief against the State of Connecticut could not be successfully prosecuted. Subsequently Dongood released Orlando of all claims which it had against it.

Orlando contends that to compel it to litigate this third party action against it in New Jersey would violate "traditional notions of fair plan and substantial justice." Orlando, an out-of-state corporation, would have to rely for its defense on officials of the State of Connecticut because the claim of Dongood was against the State of Connecticut on the state contract. Orlando could not compel the attendance of the necessary officials as witnesses and would be obviously handicapped in its defense. It would not be

"fair play" thus to compel it to litigate with this handicap; particularly when no part of the contract was performed in the State of New Jersey.

The petition of Dongood cites no decisional law to support its application. The opinion of the trial court set forth in Appendix A of the petition is amply supported by New Jersey decisional law as well as its findings of fact. The Appellate Division of the Superior Court of New Jersey affirmed substantially for the reasons set forth in the written opinion of Judge Toscano in Appendix A (2a to 7a). Upon petition for certification to the Supreme Court of New Jersey, there was a denial by the court (14a to 15a).

Respectfully submitted,

LOUIS AUERBACHER, JR.,
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